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THE TIME TO TEST OUR FAITH IN ARBITRATION

BY

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President of the United States

AND

SHOULD THE PANAMA CANAL TOLLS CONTROVERSY BE ARBITRATED?

BY

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PRO PATRIA PER ORBIS CONCORDIAM

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The Executive Committee of the Association for International Conciliation wish to arouse the interest of the American people in the progress of the movement for promoting international peace and relations of comity and good fellowship between nations. To this end they print and circulate documents giving information as to the progress of these movements, in order that individual citizens, the newspaper press, and organizations of various kinds may have readily available accurate information on these subjects. A list of publications will be found on page 23.

THE TIME TO TEST OUR FAITH IN ARBITRATION

By WILLIAM HOWARD TAFT
President of the United States

ADDRESS AT A LUNCHEON GIVEN IN HIS HONOR BY THE INTERNATIONAL PEACE FORUM, AT THE WALDORF-ASTORIA, NEW YORK CITY, JANUARY 4, 1913

Mr. Toastmaster, Mr. President, and Gentlemen of the International Peace Forum:

I rise to respond to the introduction of your Toastmaster with mingled feelings of sorrow and pleasure. I subscribe to everything that has been said with reference to the slowness with which we must expect universal peace to win its place among the nations; but once in a while there comes an opportunity that seems to be a great step forward, and when that opportunity is lost, when the step which might have been taken is not taken, the hearts of those whose hopes were high are saddened. And this meeting brings back to me the earnest, triumphant feeling that I had in my soul after I had visited almost every State in the Union, and urged the confirmation of the treaties which we had made with England and France, and then lived to find them defeated in the highest legislative body in the world, as some of the members

of that body are in the habit of calling it. The defeat was more than a mere destruction of our hope as to the progress that might be made by those treaties, because the vote carried with it a proposition which, if established as our constitutional law, relegates the United States to the rear rank of those nations which are to help the cause of universal peace. For the proposition is that the Senate of the United States may not consent with the President of the United States to a treaty that shall bind the United States to arbitrate any general class of questions that may arise in the future, but there must always be a condition that the Senate may subsequently, when the facts arise, determine whether in its discretion the United States ought to arbitrate the issue. Now I say that limitation upon the power of the United States as a Government to bind itself to obligations, to meet questions between nations with arbitration, is an obstruction not only to the progress of the United States but to the progress of the world in the matter of peace, for the reason that the nations of the world look to the United States, and properly look to the United States, as a leader in the matter of establishing peace, because we are so fortunately placed between oceans and without troublesome neighbors that we can go on without fear of consequences to establish a condition in which we shall settle every question by reference to an arbitral tribunal. It is because the nations of the world looked to us to do that that the announcement of the doctrine by the Senate of the United States, that we have no power to make an arrangement of that sort for the future, except as we adopt each particular contract to arbi-

trate each particular question, presents to those of us who hope for universal peace so great an obstruction.

Inconsistency of the Public with Regard to Peace

Now the difficulty about arguing is that when you get before an audience, everybody is in favor of peace. They are all in favor of peace. But when it comes to an election, the issue as to international peace does not play any part at all. The peace part of the political platform does not seem to affect anybody but the peace societies. And when you say to members of the Senate of the United States, "You are reaching a conclusion in which the people do not stand by you," they say, "Well, what of that, such an issue never affected a single vote at the election." Now we ought to make it control some votes, so that when a Senator rises in his seat and says, "The Senate has no power to make an obligation of this sort to bind our government to future policy of arbitration," we shall say, "Your constituents differ with you in that regard, and are looking for a Senator who will have a different constitutional view and who will not regard the sacredness of the Senate of the United States against binding itself and the Nation to future arbitration as more important than the attribute of full national sovereignty. If we are a nation at all, we must have power to bind ourselves as a nation to contracts that will not only uplift nations but uplift the world; and if we are to be limited by the fact that the Senate of the United States cannot confirm and cannot make a contract of that sort, then we have hobbled ourselves

and our national sovereignty in the possibility of progress toward a higher and a more Christian civilization.

A Test of Principle

England made a treaty—France did, and there was no doubt about the confirmation by those governments of those treaties. If they could safely do it, why could not the United States? In what respect has it higher responsibilities and more valuable privileges to lose than those great nations as between nations? They may be expected to be as careful in the preservation of their sovereigns, and what may come by way of damage to them by future contracts; but it remains for the gentlemen who have exalted the Senate above everything to find in the Constitution something that prevents them from doing what must be done if the cause of universal peace is to prosper. But they say, "There may arise after you have made a contract some question coming within the described class that you do not want to submit, some question in which you are likely to be beaten, in which you are likely to suffer a great national loss." Well, you cannot make omelets without breaking eggs. You cannot always have a jug-handled arrangement in international agreements. You must expect sometimes to be beaten. A sure thing among gentlemen who bet even is not regarded as the most honorable standard for making bets; and certainly one who would refuse to abide the judgment of a court unless he knew in advance that the Judge was with him, is not the kind of a litigant that we are in the habit of welcoming into courts.

Arbitration and the Panama Canal

And that leads me to a reference that has been made here with reference to the Panama Canal. My friend, Mr. Clews, differs with me and with the Administration in the construction of that treaty. That is all right. I suppose questions before have arisen as to construction of contracts in which good honest people have been on both sides. Now that presents to me a very significant and useful example with respect to arbitration. A good many people are saying, "Don't arbitrate because you are going to lose. This is our own canal, and while England is making a point of it, England would not fight about it, and, therefore, why give up when you are not likely to get an arbitration that will be satisfactory to you and your view of the construction?" Even if this were correct as to probability of result, which I need not and do not admit, that is just the time when I am in favor of an arbitration. I mean that I have not gone about the country urging arbitration for the purpose of using that as a platform subject to attract the attention and approval of the audience. I hope I was more conscientious in advocating what I did advocate through the country on that head, and when I said to them that we never would have an arbitration that would be effective until we entered into an obligation that brought us into arbitration when we did not think we would win. That is the time that tests your faith in that method of settlement. Now I am willing, and indeed I would be ashamed not to be willing, to arbitrate any question with Great Britain in the construction of a treaty when we reach the exact

issue which there is between the two nations. There need not be any public doubt on that subject so far as this administration is concerned. When there is a difference that cannot be reconciled by a negotiation and adjustment, then we are entirely willing to submit it to an impartial tribunal. I am hopeful that we may get it either to settlement or to submission before the Administration, in which I have the honor to be a dissolving view, shall cease; but it may not be, because these international negotiations move slowly. But I am glad to take this opportunity in this presence to say that if the time comes, there will be no doubt about what I will do in respect to the submission of that question, as far as my power goes, to an impartial tribunal for its settlement, if that is necessary.

A Step Toward International Peace

I said that I rose with regret, and I have explained to you why. I rise also with pleasure because it is a great pleasure to believe that associations like this continue the feeling in favor of peace, and that, after all, though the defeat of those treaties in the Senate was a great disappointment, the making of them and the agitation with respect to them was a step toward the goal which we all hope to reach. My own idea was that if we could make those treaties, they would form the basis for a treaty with every other nation and the United States, and then between other nations than the United States, and finally, by interlocking and intertwining all the treaties, we might easily then come to the settlement of all international questions by a court of arbitration, a permanent, well-

established court of arbitration, whose powers would be enforced by the agreement of all nations, and into which any nation might come as a complainant and bring in any other nation as a defendant and compel that defendant nation to answer to the complaint under the rules of law established for international purposes, and under the rules of law which would necessarily with such a court grow into an international code that would embrace all the higher moral rules of Christian civilization. Now that is the ideal that I had. It is the ideal that I still cherish, and while we received a body blow in taking away our power to enter into such an obligation for an arbitral court by the view of these constitutional lawyers who would limit the power of the Senate to contract for the future because it might diminish their own power in the future, nevertheless, we may hope that as time goes on those views will be modified. We may hope that the cause of peace may command more votes than it seems to have done in the past. It is not perhaps a question for political discussion in the sense of being a party question. It is one that is bound to grow and quietly establish itself, and perhaps that influence will work even upon that rock-ribbed body, the Senate of the United States.

Professor Amos S. Hershey was born at Hockersville, Pennsylvania, on July 11, 1867. He graduated from Harvard College in 1892, and then went to Germany and France. He received the degree of Ph.D. from Heidelberg in 1894, and studied at Paris during the ensuing year. Since 1895 Professor Hershey has been Professor of Political Science and International Law at the University of Indiana. He is the author of "The International Law and Diplomacy of the Russo-Japanese War," and has recently published a work entitled "The Essentials of International Public Law."

SHOULD THE PANAMA CANAL TOLLS CONTROVERSY BE ARBITRATED?

The diplomatic controversy between Great Britain and the United States respecting the legality of the remission of Panama Canal tolls to American vessels engaged in our coastwise trade, resolves itself into two main questions: (1) Does the phrase "of all nations" contained in Article III of the Hay-Pauncefote Treaty include the United States, or does it mean all nations *other* than the United States? (2) Is the remission of such tolls a "discrimination against any such nation" in the sense of the treaty?

Our Legal Obligations in the Premises

Article III, Rule 1, of the Hay-Pauncefote Treaty of 1901 provides:

"The canal shall be free and open to the vessels of commerce and of war *of all nations* observing these Rules, on terms of entire equality, so that *there shall be no discrimination against any such nation,* or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable."

Article I of the Convention concerning Arbitration between the United States and Great Britain, signed April 4, 1908, declares:

"Differences which may arise of a *legal nature or relating to the interpretation of treaties existing* between the two Contracting Parties and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration estab-

lished at The Hague by the Convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two Contracting States, and do not concern the interests of third parties."

This treaty constitutes a legal obligation. It is a solemn compact between two great nations,[1] and is as binding in law as are valid contracts between private individuals or corporations. It should be especially noted that it binds us to refer to The Hague Tribunal differences of a *legal nature*, and particularly those relating to the *interpretation of treaties*, which have not been settled by diplomacy, unless such differences affect the vital interests, independence, or honor of either State or concern the interests of third parties.

It will not be seriously maintained that the existing controversy falls within the scope of any of the exceptions above named to the application of the treaty. Certainly the difference is not one which affects the vital interests, the independence, or the honor of either

1 "'A treaty,' says Plumley, umpire, in the case of the heirs of Jean Maninat (French-Venezuelan Commission of 1902, Ralston's Report, 44, 73), 'is a solemn compact between nations. It possesses in ordinary the same essential qualities as a contract between individuals, enhanced by the weightier quality of the parties, and by the greater magnitude of the subject-matter. To be valid, it imports a mutual assent, and in order that there may be such a mutual assent there must be a similar understanding of the several matters involved. It can never be what one party understands, but it always must be what both parties understand to be the matters agreed upon and what in fact was the agreement of the parties concerning the matters now in dispute.'" Cited by Ralston, *International Arbitral Law and Procedure*, p. 4.

State, as these terms are usually understood. Such a contention would be too absurd for serious argument. It may seem at first thought as though the interests of third parties were involved in the settlement of this dispute. But a little reflection will lead to the conviction that the difference is one which does not concern the interests of other States. Their interests may be *affected* (as, indeed, is often the case when there are treaties between two States), but they are not directly *concerned* in the dispute itself, which is solely between Great Britain and the United States.

Inasmuch as the Arbitration Treaty in question was only concluded for a period of five years from date of the exchange of ratifications, it has been suggested that the United States may avoid her obligations, if any, to Great Britain in the matter of the Panama tolls by refusing to renew the Convention upon its expiration in May, 1913. Even supposing that the United States Government were willing to fly in the face of public sentiment and attempt to evade the issue in this disgraceful manner, it would probably be in vain; for the controversy would be regarded as having arisen prior to the expiration of the treaty, and the United States has agreed to arbitrate *existing* differences, i. e., existing under the treaty, or while the treaty was still in force.

It has thus been demonstrated that the United States is *legally* bound to arbitrate the dispute with Great Britain respecting the legality of the remission of the Panama Canal tolls to American vessels engaged in the coastwise traffic. What are our *moral* obligations in the premises?

Our Moral Obligations in the Premises

The United States has been the consistent champion of international arbitration ever since this ancient practice was revived in modern times by the Jay Treaty of 1794. Among the many arbitrations to which this country has been a party, might be indicated various important boundary disputes, the Alabama Claims and Bering Sea Controversies, and the Northeastern Fishery Question (the latter involving an interpretation of Article I of the Treaty of 1898). As a keen student and practitioner of international law has well said:

"The experience of the United States affords abundant evidence of the fact that if an international controversy is of a legal character, it is capable of adjustment by arbitration whether the claims involved are national or private; whether the issue is one of fact or of law; whether the difference is one concerning the ownership of land or the control of water; whether the honor of the State is involved, or even its most vital interests." [1]

[1] Hyde, in 2 *Proceedings of the Second National Peace Congress* (1909), p. 232.

For a very complete account of the arbitrations to which the United States had been a party up to 1898, see Moore's monumental *History and Digest of International Arbitration*, in 5 vols.

See also Darby's *International Tribunals* (4th ed., 1904) for a brief digest of modern arbitrations. Out of 228 instances of "formal" arbitrations occurring between 1794 and 1901, cited by Darby, the United States was a party in 68 cases, Great Britain in 81, France in 28, Prussia or Germany in 17, and Russia in 8.

The United States at the First Hague Conference

At the First Hague Conference of 1899 the United States was particularly active in urging arbitration and assisting in the creation of the so-called Permanent Court of Arbitration at The Hague. Our Government subscribed to the following declaration contained in the Arbitration Convention adopted at The Hague:

"In questions of a legal nature, and *especially in the interpretation or application of International Conventions,* arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable means of settling disputes, which diplomacy has failed to settle." [1]

The United States at the Second Hague Conference

At the Second Hague Convention of 1907 the United States was one of the most vigorous advocates of a scheme for obligatory arbitration, and the American delegation proposed a project for a Court of Arbitral Justice which, if adopted, would have transformed The Hague Tribunal, or so-called Court of Permanent Arbitration created in 1899, into a real per-

[1] Article 16, of the Convention of 1899 for the Pacific Settlement of International Disputes. At the Second Hague Conference, the following recommendation was added: "Consequently, it would be desirable that, in disputes regarding the above-mentioned questions, the Contracting Powers should, if the case arise, have recourse to arbitration, in so far as circumstances permit. Article 38 of the First Hague Convention of 1907.

manent High Court of International Justice, or Supreme Court of the Nations. Both schemes failed of adoption, but the Contracting Powers represented at The Hague declared themselves "unanimous": "(1) In admitting the principle of obligatory arbitration. (2) In declaring that certain disputes, in *particular those relating to the interpretation and application of the provisions of international agreements*, may be submitted to obligatory arbitration without restriction." A Convention providing for the establishment of a system of real international justice will probably be agreed upon at the Third Hague Peace Conference.

The Interpretation of Treaties

However authorities on international law may differ in their views as to the possible scope of arbitration as applied to the settlement of international disputes, there appears to be a consensus of opinion among them that interpretation of treaties is a proper subject for judicial determination. The rules for such interpretation are derived from general jurisprudence, and there is general agreement among the authorities as to the more important of these rules.[1]

[1] On the *Interpretation of Treaties*, see especially: Adler, in 26 *Law Magazine Review* (5th series, pp. 62ff. and 164ff.; Bonfils, *Manuel de droit int. public* (Fauchille's 5th ed.), Nos. 835–844; 1 Cobbett, *Cases*, pp. 328–333; Hyde, in 3 *American Journal of Int. Law* (1910), pp. 46ff.; Hershey, *Essentials of Int. Public Law* (1912), § 299; 2 Fiore, *Nouveau droit int. public* (Antoine's French trans.), Nos. 1032–1046; Hall, *Int. Law* (Atlay's 6th ed.), pp. 327–334; 5 Moore, *Int. Law Digest*, §§ 763–764; 1 Oppenheim, *Int. Law* (1905), §§ 553–554; 2 Phillimore, *Commentaries upon Int. Law*, Pt. V, ch. 8, §§ 64–95; Pic, in 17 *Revue générale de droit int. public*,

"The method of interpretation consists in finding out the connection made by the parties to an agreement between the terms of their contract and the objects to which it is to be applied. This involves two steps. One is to ascertain what has been called the 'standard of interpretation'; that is, the sense in which the various terms are employed. The other is to learn what are the sources of interpretation; that is, to find out where one may turn for evidence of that sense."[1]

The main purpose of interpretation is to determine the real intentions of the parties. To this end diplomatic correspondence, or interchange and expression of views leading up to the final negotiation and ratification of the treaty, would be all-important. For instance, the fact that an amendment was lost in the Senate providing that the United States should reserve the right to discriminate in respect to charges in favor of our own citizens, would not be decisive in itself. All the circumstances leading up to this vote would have to be taken into account. Besides, there are many other conditions surrounding the case which would have to be considered, such, for example, as the bearing of the Clayton-Bulwer upon the Hay-Pauncefote Treaty, more particularly whether the latter treaty was the main consideration for the abrogation of the former.

(1910), pp. 5–35; 2 Pradier-Fodéré, *Traité de droit int. public*, Nos. 1171–1188; Taylor, *A Treatise on Int. Public Law*, §§ 377–393; Vattel, *Le droit des gens* (Eng. trans. in 1859), Bk. II, ch. 17; 2 Wharton, *Digest of Int. Law*, § 133; Wheaton (Atlay's ed.), § 287a; Wilson, *Handbook of Int. Law*, ch. 7; Woolsey, *Introduction to Int. Law* (6th ed.), § 113.

[1] Hyde, in 3 *American Journal of Int. Law* (1910), p. 46.

The Questions for Judicial Determination

As stated at the outset, one of the main questions for judicial determination is: "Does the phrase 'of all nations' contained in Article III of the Hay-Pauncefote Treaty include the United States or does it mean all nations *other* than the United States?" There seems here to be an ambiguity of language to which well-known rules of interpretation may be readily applied. But granted that Great Britain's interpretation of this phrase is correct, there remains the question: "Is the remission of such tolls a 'discrimination against any such nation,' in the sense of the treaty," or is it perhaps a mere subsidy? Upon questions of this kind our Courts are constantly passing judgment. They are frequently called upon to decide whether a given practice, such as the granting of rebates in disguised forms, constitutes a discrimination or rebate in the sense forbidden by our statute or common law. Clearly these are questions which can and should be "settled by reference to known rules." [1]

Difficulties in the Way of Arbitration

It has been maintained that there are practical difficulties in the way of a just and impartial arbitration of this question, arising either from defects inherent

[1] The above phrase set in quotation marks is Westlake's famous definition of a legal question. This definition has been accepted, so far as the writer is aware, by all authorities who have discussed this problem. Political differences are those which result from serious conflicts of political, social, racial, or economic interests. They are usually regarded as questions of national policy to the solution of which it is either difficult or impossible to apply judicial methods.

in the arbitral system or from the alleged impossibility of finding judges who do not belong to interested nations.

It may be admitted that so-called courts or commissions of arbitration too often, in the past, have sought a solution of the controversy submitted to them by way of compromise, rather than through the application of legal principles to the case in hand. But in the administration of international justice, during recent years, great progress has been made in the direction of substituting better methods, higher ideals, and more carefully selected judges for mixed commissions and occasional tribunals. Arbitral decisions are coming more and more to represent the application of principles of law and equity by trained jurists working in a judicial spirit instead of by arbiters animated by a mere desire to compromise the issue. In a word, in the settlement of international differences, more advanced judicial methods and a better judicial organization are taking the place of the older system of haphazard, compromising arbitration.

The defects in the arbitral system of the past have been due mainly to a want of care in the selection of judges, or to the lack of a carefully drafted agreement clearly defining the questions at issue and the rules of procedure to be observed. But none of these defects are beyond remedy, and the Hague Conferences of 1899 and 1907 have furnished us not merely with a better method of selecting judges than was previously in vogue, but also with an elaborate code of arbitral procedure which should prove adequate in most cases.

As to the alleged impossibility of finding fair and impartial judges to settle this particular disagreement,

it may again be admitted that the difficulty is a real one. But we are here dealing with a difficulty—not an impossibility. It is true that all the maritime powers of the world (including those of South America) are in a sense interested in the decision of this case. It has been suggested that "Switzerland is perhaps the only country capable of furnishing international jurists of high standing, who would probably be free from all pressure of selfish public opinion when acting as judges of the case." [1]

Switzerland could undoubtedly furnish them. So could many other countries, including Great Britain and the United States. In a tribunal composed wholly of arbitrators selected by the interested Governments for the settlement of the Alaskan boundary dispute (1903), Lord Alverstone, the President of the Tribunal, sustained the contention of the United States that it should continue to enjoy a continuous strip of mainland separating the British territory from the inlets of the sea. In nearly all countries of the civilized world there are to-day international jurists who, whether engaged in the practice of law at the bar, administering it on the bench, or holding chairs in our Universities and Law Schools, possess the requisite knowledge, courage, and judicial spirit to declare and administer the law applicable to this and similar differences of a legal nature. The time has, indeed, passed when it can be seriously maintained that such disputes are incapable of judicial solution. Least of all can the United States afford to refuse to settle such a controversy whether by arbitral or judicial methods.

[1] The *Outlook* for Dec. 7, 1912.

LIST OF PUBLICATIONS

Nos. 1–54, inclusive (April, 1907, to May, 1912). Including papers by Baron d'Estournelles de Constant, George Trumbull Ladd, Elihu Root, Barrett Wendell, Charles E. Jefferson, Seth Low, William James, Andrew Carnegie, Philander C. Knox, Pope Pius X, Heinrich Lammasch, Norman Angell, and others. A list of titles and authors will be sent on application.

Special Bulletin: War Practically Preventable, and Arguments for Universal Peace, by Rev. Michael Clune, June, 1912.

55. The International Mind. Opening Address at the Lake Mohonk Conference on International Arbitration, by Nicholas Murray Butler, June, 1912.

56. The Irrationality of War. On Science as an Element in the Developing of International Good Will and Understanding, by Sir Oliver Lodge, July, 1912.

57. The Interest of the Wage-earner in the Present Status of the Peace Movement; Address Delivered at the Lake Mohonk Conference on International Arbitration, by Charles Patrick Neill, August, 1912.

58. The Relation of Social Theory to Public Policy, by Franklin H. Giddings, September, 1912.

59. The Double Standard in Regard to Fighting, by George M. Stratton, October, 1912.

60. As to Two Battleships. Contributions to the Debate upon the Naval Appropriation Bill in the House of Representatives, November, 1912.

61. The Cosmopolitan Club Movement, by Louis P. Lochner, December, 1912.

62. The Spirit of Self-Government; Address Delivered at the 144th Anniversary Banquet of the Chamber of Commerce of the State of New York, by Elihu Root, January, 1913.

63. The Time to Test Our Faith in Arbitration, by William Howard Taft, and Should the Panama Canal Tolls Controversy be Arbitrated? by Amos S. Hershey, February, 1913.

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